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No. 03-313

Supreme Court, U.S.
FILED
OCT 29 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION and HEIGHTS ENERGY CORPORATION,

Petitioners,

v.

PETROLEO BRASILEIRO, S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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15 pp

QUESTIONS PRESENTED FOR REVIEW

1. In a contract between United States corporations and a foreign corporation there is a forum selection clause that mandates that disputes concerning or relating to the contract be resolved in arbitration in a foreign country. The contract has a survivability clause that does not provide for the extension of the forum selection clause. After the termination of the contract, does the forum selection clause govern every other subsequent contract or tortious act between those entities?

2. What is a court of appeal's proper standard of review over a district court's order on a motion to dismiss due to a forum selection clause?

3. What is the proper procedural vehicle to raise a forum selection clause issue?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (hereinafter referred to collectively as "Strata") respectfully file this Reply Brief to Petroleo Brasileiro, S.A.'s ("Petrobras") Brief in Opposition.

I. This Case Perfectly Presents An Opportunity to Resolve Several Important Issues in International Business Litigation

This case brings three important and related issues to this Court – 1) whether a forum selection/arbitration clause in an expired agreement can bar all of a party's claims that arose from agreements and conduct that were entered into and occurred after the termination of the initial agreement; 2) whether the court of appeals' standard of review is de novo on a forum selection clause issue; and 3) what the correct procedural vehicle is to raise a forum selection clause issue. Due to the importance of international commerce, these issues are of great importance to the public in general. Further, the courts of appeals have conflicting opinions on these issues. Accordingly, this Court should grant the Petition for Writ of Certiorari.

II. Factual Disagreements

Petrobras makes several accusations in its Brief in Opposition that must be addressed. First, on page 2, Petrobras asserts that Strata's statement that the forum selection clause was part of a "contract that was not the subject of the litigation" is misleading. However, this

statement was accurate. The only agreement that expressly contained the forum selection clause was the MOU.[1] The MOU was a preliminary agreement to provide Strata certain information in order for them to evaluate whether they wished to continue negotiations and wished to provide recommendations to Petrobras under another agreement – it was a confidentiality agreement. (R. 213-212). Strata and Petrobras did not raise any claims that dealt with the unauthorized disclosure of information, the failure to return information, or any other topic covered by the MOU. Further, the forum selection clause was not

[1] Strata and Petrobras entered into a Memo of Understanding ("MOU") on June 11, 1997, that governed issues of confidentiality so that Petrobras could disclose various projects available for joint development. (R. 227). After reviewing the proposed projects, Strata selected two projects (BES-1 and BFS-1) to do a technical review, and after Petrobras confirmed that they were available, the parties entered into an Agreement on Technical Assistance ("ATA") on August 4, 1997. (R. 227, 212-211). The ATA was an agreement whereby Strata, having reviewed the information provided under the MOU, made recommendations with respect to exploration of oil and gas prospects and/or enhancement of marginal fields. (R. 212-211). Under the ATA, Strata released data to Petrobras on specified areas or projects with respect to technical and economic evaluations. (R. 212-211). To enter into a joint venture to develop oil and gas properties, the parties were required to negotiate another independent agreement aside from the ATA and MOU. The Heads of Agreement ("HOA") is a separate agreement from the MOU and the ATA and is one of the bases of the underlying suit. After years of negotiation, Petrobras and Strata contracted and agreed to all material terms of the HOA for enhancement of three marginal fields in Brazil – it was a joint development agreement. (R. 227, 223). Petrobras prepared the HOA and it was executed by Strata on July 30, 1999. (R. 223). When Strata signed the HOA, Petrobras represented that it approved the HOA's execution but that its signatory officer was out of the office that day and that the HOA would be signed by Petrobras when he returned. (R. 223).

expressly included in the ATA, it was incorporated by reference, as were all the other provisions of the MOU.

The ATA was an agreement whereby Strata, having reviewed the information provided under the MOU, made recommendations with respect to exploration of oil and gas prospects and/or enhancement of marginal fields. (R. 212-211). As made clear by the terms of the ATA, no agreement for joint activities had been entered into, and the agreement was simply a vehicle by which the parties continued to assess whether they wished to enter into joint ventures and joint activities. (R. 212-211). It also dealt with the exchange of information. Strata and Petrobras did not raise any claims that dealt with the ATA. Strata's claims are factually based upon agreements, promises and conduct that occurred after the termination of the MOU. Accordingly, Strata's statement was correct.

Further, in Footnote 1, on page 3, Petrobras alleges that Strata made a false statement in saying that the parties "entered into" an oil and gas joint development agreement. However, the evidence shows that after years of negotiation, Petrobras and Strata contracted and agreed to all material terms of the HOA for enhancement of three marginal fields in Brazil. (R. 227, 223). In Strata's Petition (pg. 4), it was forthcoming with the fact that despite promises to sign the HOA, Petrobras refused to do so. However, there is Texas state common law and Brazilian law that would allow the parties' agreement and Petrobras' promises to be enforced. Accordingly, Strata's statement is true, the parties did enter into an agreement.

Lastly, Petrobras complains that Strata failed to state that the ATA incorporates all of the MOU's provisions, including the forum selection clause. However, that fact is

not procedurally or substantively significant. Strata did not sue over the ATA. Further, the ATA's incorporation of the provision could not expand its scope – which was solely related to the MOU: "Any dispute, controversy or claim arising out of or relating to ***this MOU or the breach, termination of invalidity hereof***, which cannot be settled amicably between the parties shall be settled by arbitration to be conducted in Rio de Janeiro in the Portuguese language." (R. 116). Further, as the ATA incorporated the forum selection clause, it also incorporated the term of the clause which mandated that the clause expired before the relevant conduct in this suit transpired.[2] Accordingly, the ATA's incorporation makes no difference in this case.

III. Application of the Forum Selection Clause in This Case Is More Than Fact Based, and Presents Important Questions For This Court's Consideration

Petrobras attempts to dissuade this Court from granting Strata's Petition by stating that it brings nothing more than a fact based issue that has no importance.[3]

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[2] Paragraph 2.1 of the MOU provided that it was binding for a period of twelve (12) months from the date of execution, and that it could be extended or rescinded by mutual agreement of the parties upon thirty (30) days' prior written notice to the other party. (R. 119-18). Neither Strata nor Petrobras extended the MOU, and it expired on June 11, 1998. (R. 213-211). Petrobras agreed to enter the HOA in July of 1999, and made its fraudulent misrepresentations in September of 1999. (R. 223, 226).

[3] If this Court had a dime for every time a respondent stated that the petition only brought forth factual issues, the national debt would surely be erased.

However, this case deals with large international issues that are important to the jurisprudence and the public in general. This case involves whether the federal court's broad application and construction of forum selection/arbitration clauses should be extended to reach to situations where such an application is contrary to the written intention of the parties to a contract. That is, will the court's broad application of arbitration clauses as a matter of policy override the intention of the parties. On a daily basis, United States' companies enter into agreements with international companies – and often it is not the parties' first agreement. Should a forum selection clause in an initial, expired agreement control all disputes the parties have that revolve around other agreements? This issue is squarely brought to this Court in this case. True, the issue does rest to some extent on the facts of this case (as all issues before this Court do). However, this issue is certainly broad and important enough to justify this Court granting Strata's Petition.

Before a court should compel arbitration, it must find that there is a binding arbitration agreement between the parties, and if so, find that the plaintiff's claims fall within the scope of the arbitration agreement.[4] *See Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001). In determining whether a claim falls within the scope of an arbitration agreement, courts should focus on the factual underpinnings of the claim. *See Medtronic Ave. Inc. v.*

[4] As the forum selection clause provided that disputes relating to the MOU would be arbitrated in Brazil, Strata refers to the provision as a forum selection/arbitration clause and cites to precedent discussing both forum selection clauses and arbitration clauses.

Advanced Cardiovascular Systems, Inc., 247 F.3d 44 (3rd Cir. 2001).

In this case, there was a forum selection/arbitration clause in a preliminary, independent agreement between Strata and Petrobras – the MOU. (R. 116). The MOU was a confidentiality agreement with respect to the information Petrobras provided to Strata in the initial stages of their negotiations for a joint venture of certain oil and gas properties situated in Brazil. The forum selection/arbitration clause was solely related to the MOU. (R. 116). The claims in this suit, however, do not arise out of or relate to the MOU. Accordingly, the Court of Appeals erred in finding that the forum selection/arbitration clause applies and in ordering that the case be dismissed.[5]

This holding was consistent with prior opinions written by the Fifth Circuit dealing with the applicability of an arbitration provision in one contract controlling disputes over other contracts that did not contain such a provision. *See, e.g., Personal Sec. & Safety Sys. v. Motorola, Inc.*, 297 F.3d 388, 393-94 (5th Cir. 2002); *Pennzoil Exploration & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998). These holdings obviously do not contemplate that parties may include forum selection/arbitration provisions

[5] The Court of Appeals erred in finding that this case should be dismissed if Strata's claims "related to" the ATA. *See* Joint Appendix 15a. The clause specifically limits its application to the MOU. Certainly, if the Parties had so desired they could have expanded the clause's scope – but they did not. *See, e.g., Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (4th Cir. 1998) (arbitration clause in one contract applied to dispute over other agreement where clause applied to "any aspect of the relationship" between the two parties).

in some agreements but intentionally exclude them from others.

Other courts, however, have held that an arbitration provision in one agreement does not control disputes over another agreement. *See Specht v. Netscape Commun. Corp.*, 306 F.3d 17, 36-37 (2nd Cir. 2002) (court affirmed denial of arbitration motion where arbitration clause in one licensing agreement did not effect claims raised under separate agreement); *Arco Corp. v. Anglin*, 216 F.3d 589, 595 (7th Cir. 2000) (court reversed arbitration award as it covered claims based upon a retail agreement where only a guarantee agreement contained the arbitration clause); *Industrial Elecs. Corp. v. iPower Distrib. Group*, 215 F.3d 677, 680-81 (7th Cir. 2000) (court affirmed denial of arbitration where arbitration clause in franchise agreement did not control dispute over association agreement); *Security Watch, Inc. v. Sentinel Sys.*, 176 F.3d 369, 372-73 (6th Cir. 1999) (court affirmed denial of arbitration where dispute over earlier contract was not controlled by arbitration provision in later contract); *ITT Hartford Life & Annuity Ins. Co. v. Amerishare Investors*, 133 F.3d 664, 668-70 (8th Cir. 1998) (court affirmed denial of arbitration where arbitration in marketing agreement did not control dispute over guarantee and notes); *International Amb. Programs v. Archexpo*, 68 F.3d 337, 339-40 (9th Cir. 1995) (court ordered that dispute over a contract should not have been arbitrated and a judgment based thereon was valid even though there was an arbitration award based on a separate contract); *Swenson's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1310 (8th Cir. 1991) (court affirmed denial of arbitration where arbitration clause in franchise agreements did not control dispute over distribution agreement); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339,

344-45 (8th Cir. 1990) (court affirmed denial of arbitration where arbitration clause in settlement agreement did not control dispute over non-disclosure agreement); *Battaglia v. McKendry*, No. 98-5321, 2002 U.S. Dist. LEXIS 2805 (E. D. Penn. February 21, 2002); *Magellan Real Estate Inv. Trust v. Losch*, 109 F.Supp.2d 1144, 1159 (D. Ariz. 2000); *Weber v. Hall*, 929 S.W.2d 138, 142-43 (Tex. App. – Houston [14th Dist.] 1996, orig. proc.); *Jacobson v. Mailboxes Etc.*, 646 N.E.2d 741, 745 (Mass. 1995); *Crowson v. Sealaska Corp.*, 705 P.2d 905, 910 (Alaska 1985).

Whether Strata's claims based upon promises and representations in the HOA and fraudulent conduct after the HOA are related to an expired forum selection/ arbitration clause in a separate confidentiality agreement is an important question. True, the facts of the case do play some part in the determination. But the bigger picture shows that this case presents this Court with an opportunity to give parties and courts guidance as to the breadth of forum selection/arbitration provisions in contracts where the parties' dispute centers around another contract. Specifically, this Court has the opportunity to rule upon the tension of enforcing a policy to give broad application to forum selection/arbitration clauses against the contrary intentions and expectations of the parties to the contract. *See Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). The courts of appeals seem at odds on this issue, it is very important to the public in general, and this Court should grant Strata's Petition.

IV. Vehicle to Raise Forum Selection Issue and Standard of Review Are Important Issues That This Court Should Address

In addition to the important issue regarding the breadth of a forum selection/arbitration clause in an expired agreement, this Court should also review the important issues concerning the appropriate procedural vehicle to raise a forum selection clause and the appropriate standard of review over that determination. District courts and courts of appeals face these issues every day – there are few issues that are more often addressed by the lower courts. Further, as set forth in Strata's Petition, there is currently a split in the courts of appeals concerning those issues. In fact, Petrobras' admitted shotgun approach at raising the forum selection clause is evidence as to the great confusion that exists in the lower courts as to the appropriate vehicle to raise the issue.

Petrobras argues that Strata did not raise these issues below, but it did. First, Strata raised the issue of what the appropriate procedural vehicle is for raising a forum selection clause in its motion for rehearing to the Court of Appeals. The Court of Appeals decided not to issue a new opinion and address the issue, but the issue was squarely presented to the Court. Further, Strata presented the Court of Appeals with conflicting case law on the appropriate standard of review over a forum selection issue in its Brief of Appellees – the Court of Appeals used the standard that it had previously used in prior cases. Therefore, these two fundamental, important issues were raised below, and this Court has the authority to grant Strata's Petition and address them and clarify this confused area of the law.

V. Conclusion

Strata requests that this Honorable Court grant their petition for a writ of certiorari because this case presents important questions of international trade and commerce and because there is currently conflict between the courts of appeals regarding the proper procedural device to raise a forum selection clause issue and the appropriate standard of review over the determination of that issue.

Respectfully submitted,

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